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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 ANTHONY HERBERT,

11 Plaintiff,

12 v.

13 FEDERAL BUREAU OF  
14 INVESTIGATION,

15 Defendant.

CASE NO. C17-1032JLR

ORDER DISMISSING ACTION  
UNDER 28 U.S.C. § 1915(E)(2)(B)

16 **I. INTRODUCTION**

17 Before the court is *pro se* Plaintiff Anthony Herbert's complaint. (Compl. (Dkt.  
18 # 8).) Mr. Herbert requested and was granted *in forma pauperis* status to file suit. (IFP  
19 Mot. (Dkt. # 1); IFP Order (Dkt. # 7).) If a plaintiff proceeds *in forma pauperis*, the court  
20 must dismiss the complaint if the complaint is frivolous, malicious, fails to state a claim  
21 on which relief may be granted, or seeks monetary relief from a defendant who is  
22 immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i), (ii), (iii). As discussed below,

1 Mr. Herbert's complaint falls within the category of pleadings that the court must  
2 dismiss.

## 3 II. BACKGROUND

4 In his complaint, Mr. Herbert sues the "Federal Bureau of Investigations" [sic]  
5 ("FBI"). (Compl. at 1.) Although Mr. Herbert's complaint is difficult to understand, he  
6 alleges that the FBI "failed to protect [him] by kicking [him] out of their office with  
7 aggressive behavior, hanging up on [him] when [he] called to speak to a duty officer[,]  
8 and telling [him] that duty officers [do not] talk to people on the phone." (*Id.*) He  
9 complains that an FBI agent told him to report the alleged hacking of his computer and  
10 credit cards to the local police, but the local police failed to help him as well. (*Id.* at 1-2.)

11 Mr. Herbert also alleges a litany of experiences that he claims have injured and  
12 from which the FBI has failed to protect him. (*See id.* at 2.) He asserts that his car has  
13 been damaged and broken into, although he does say by whom. (*Id.*) He further avers  
14 that his "lips have been burned with acid" and that he was sexually assaulted while he  
15 was a mental health patient at Harborview Medical Center in Seattle, Washington, and  
16 also while he was a patient at Valley Medical Center in Renton, Washington. (*Id.*) He  
17 further alleges that he has "received a ticket of some sort by almost every local police  
18 agency twice." (*Id.*) He also alleges that he called 911 from his hotel on Highway 99  
19 and waited 20 minutes for the ambulance to arrive and was later arrested for telephone  
20 harassment and had his iPhone 7 seized as evidence. (*Id.*) He asserts that the FBI's  
21 failure to protect him from these events, as well as from public harassment and at least  
22 three assaults, amounts to an "assassination attempt." (*Id.*)

1 As a remedy, Mr. Herbert seeks an injunction “[r]estraining the FBI from stalking,  
2 harassing, intimidating, threatening[,] or sabotaging [him] or his cars.” (*Id.*) He also  
3 seeks \$1,000,000,000.00 in damages. (*Id.*)

### 4 III. ANALYSIS

5 Because Mr. Herbert is proceeding *in forma pauperis*, the court must dismiss his  
6 case if the court determines that his action: (i) is frivolous or malicious; (ii) fails to state  
7 a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant  
8 who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). Because Mr. Herbert is a  
9 *pro se* plaintiff, the court must construe his pleadings liberally. *See McGuckin v. Smith*,  
10 974 F.2d 1050, 1055 (9th Cir. 1992). Mr. Herbert does not indicate the law under which  
11 he brings his claims. (*See generally* Compl.) However, under a liberal construction, Mr.  
12 Herbert appears to be attempting to bring an action for the deprivation of federal or  
13 constitutional rights, which is known as a “*Bivens*” action. *See Bivens v. Six Unknown*  
14 *Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

15 A *Bivens* action cannot be maintained against the FBI, because the purpose of  
16 *Bivens* is to deter federal officers—not federal agencies. *See F.D.I.C. v. Meyer*, 510 U.S.  
17 471, 484-85 (1994) (“If we were to imply a damages action directly against federal  
18 agencies, thereby permitting claimants to bypass qualified immunity, there would be no  
19 reason for aggrieved parties to bring damages actions against individual officers . . . [and]  
20 the deterrent effects of the *Bivens* remedy would be lost.”). Consequently, Mr. Herbert  
21 cannot sue the FBI under *Bivens*. *See Murphy v. Gordwin*, No. 06-16924, 2007 WL  
22 4570579, at \*1 (9th Cir. Dec. 28, 2007) (affirming the dismissal of a *Bivens* claim against

1 the FBI); *Smith v. F.B.I.*, No. 01-1384, 2001 WL 1450814, at \*1 (6th Cir. Nov.6, 2001)  
2 (same).

3 Moreover, the United States has not waived its sovereign immunity from suit in  
4 actions seeking monetary damages for constitutional violations. *See Thomas-Lazear v.*  
5 *F.B.I.*, 851 F.2d 1202, 1207 (9th Cir. 1988) (“[T]he United States has not waived its  
6 sovereign immunity in actions seeking damages for constitutional violations”); *see also*  
7 *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994) (declining to recognize a direct action for  
8 damages against federal agencies). Thus, Mr. Herbert’s claim for damages is also subject  
9 to dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

10 Finally, the court must dismiss a complaint under 28 U.S.C. § 1915(e)(2)(B)(ii) for  
11 failure to state a claim upon which relief may be granted “if it appears beyond a doubt  
12 that the plaintiff can prove no set of facts in support of his claims that would entitle him  
13 to relief.” *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). In addition, a  
14 finding of frivolousness under 28 U.S.C. § 1915(e)(2)(B)(i) is appropriate if the facts  
15 alleged “rise to the level of the irrational or wholly incredible.” *Denton v. Hernandez*,  
16 504 U.S. 25, 33 (1992). Mr. Herbert’s complaint meets the criteria for dismissal under  
17 either § 1915(e)(2)(B)(i) or § 1915(e)(2)(B)(ii). Although the court does not doubt that  
18 Mr. Herbert’s beliefs are sincere, his allegations rise to the level of the wholly incredible.  
19 Accordingly, the court dismisses his complaint on this ground as well.

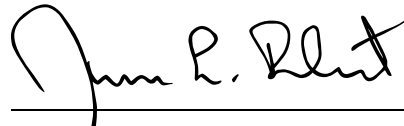
20 The court must give a *pro se* litigant leave to amend his or her complaint to state a  
21 claim unless it is absolutely clear that amendment cannot cure the complaint’s  
22 deficiencies. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (noting

1 leave to amend should be granted when a complaint is dismissed under 28 U.S.C.  
2 § 1915(e) “if it appears at all possible that the plaintiff can correct the defect”). Because  
3 Mr. Herbert has not pleaded a cognizable legal theory and it appears that he cannot cure  
4 the defects in his complaint by alleging additional facts, the court dismisses his action  
5 without leave to amend. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir.  
6 1996) (ruling that denial of leave to amend is not an abuse of discretion where further  
7 amendment would be futile).

#### 8 IV. CONCLUSION

9 Based on the foregoing analysis, the court DISMISSES Mr. Herbert’s complaint  
10 without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B).

11 Dated this 17th day of August, 2017.

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14 JAMES L. ROBART  
15 United States District Judge  
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